

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2021

Public Authority: Council of Queen Mary University of London
Address: Mile End Road
London
E1 4NS

Decision (including any steps ordered)

1. The complainant has requested the full content of any reports commissioned by Queen Mary University of London in the last three years to examine its own equality, diversity and inclusion (EDI) practices. The Council of Queen Mary University of London (the University) provided the complainant with a report, but redacted some information contained within the appendices under section 40(2) of the FOIA on the basis that this information is third party personal data, and its disclosure would breach data protection law.
2. The Commissioner's decision is that the University is entitled to withhold this information in accordance with section 40(2) of the FOIA.
3. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA as the University failed to respond to the complainant's request within the statutory time limits.
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

5. On 1 November 2020 the complainant made the following request for information under the FOIA:

1) "The full content of any report commissioned by QMUL in the last three years to examine its own equality, diversity and inclusion practices"

2) For each of those reports (where they exist): any written correspondence relating to that report by any QMUL staff member who is a member of any EDI committee, the EDI steering group, College Council or the Senior Executive Team"

6. The complainant followed up his request with the University on 1 December 2020. The University responded on 4 December 2020, advising that it was still considering the request and would try to respond as soon as possible.
7. The University responded on 11 December 2020. It provided the complainant with a report in response to part one of the request but redacted some information from the appendices of the report. The redactions were made on the basis that the information in question was third party personal data, disclosure of which would breach data protection law, and it was therefore exempt from disclosure under section 40(2) of the FOIA. The University withheld the information falling within the scope of part two of the request under the exemption provided by section 12(1) of the FOIA, on the basis that responding to this part of the request would exceed the appropriate cost limit set out in the FOIA.
8. The complainant wrote to the University on 18 December 2020, advising that he was withdrawing part two of his request and requesting an internal review of its decision to only partially publish the report. The complainant asked the University to confirm the following:

"That in the partially published Inclusion Report, every piece of information that has been withheld from publication contains enough personal data to identify any particular QMUL staff member as an individual. I accept this might be the case for some pieces of data in this report, but surely not every black box: for example, hypothetically, if there were a comment as vague as "I was overlooked for a promotion because I was black", that information is not sufficient to identify any QMUL employee and therefore must not be withheld.

That there is evidence that it is not within the testimony-giving individuals' reasonable expectations that their evidence would be (made anonymous and then) disclosed to the public realm. This process was sold to QMUL staff as a transparent investigation into inclusion at QMUL. I think they might have reasonably expected these comments to have been shared with other staff. (For example, as a participant in one of the focus groups of this review, I do not remember being given any such assurances that my evidence would not be anonymised and disclosed to other staff, and in fact was

anticipating and looking forward to reading about others' experiences of inclusion at QMUL in the report.)"

9. The complainant chased up his internal review request on 18 January 2021. The University responded on 19 January 2021, stating that it would endeavour to carry out the internal review as soon as it could.
10. The complainant wrote to the University on 25 January 2021, providing an argument to support his internal review request. The complainant referred to an email that was released on 25 January 2021 in response to a different FOIA request that discussed how data would be communicated from Inclusion Works to the University. The complainant argued that the information provided in the other FOIA request contradicts the information the University provided in response to his FOIA request on 11 December 2020.
11. The University provided the outcome of its internal review on 2 February 2021, maintaining its original position.

Scope of the case

12. The complainant contacted the Commissioner on 2 February 2021 to complain about the way his request for information had been handled.
13. The Commissioner considers the scope of this case is to determine whether the University is entitled to withhold the information redacted from the appendices of the disclosed report under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
15. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).

16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA 2018"). If it is not personal data, then section 40 of the FOIA cannot apply.
17. Secondly, if the Commissioner is satisfied that the requested information is personal data, she must then establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

18. Section 3(2) of the DPA 2018 defines personal data as:

"any information relating to an identified or identifiable living individual".

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. An individual is "identifiable" if they can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
21. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
22. The University believes that all of the withheld information is the personal data of individuals employed by the University. These individuals volunteered to take part in focus groups to contribute to the creation of an Inclusion Report, commissioned by the University from an external company called Inclusion Works.
23. The University considers that the withheld information tells something about each of the individuals who made each comment/observation. The University contends that the withheld information is the personal data of the individuals who expressed the views recorded and that those individuals are potentially identifiable due to the size of the focus groups and the specificity of many of them. In making this assessment the University has referred to page 9 of the Commissioner's guidance on section 40, specifically that a public authority is to consider all the means available to a third party to be able to identify an individual:

*"When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."*²

24. The University stated that the individuals in each focus group would know one another and possibly have told colleagues and even those outside of the University that they had taken part in this exercise, having actively volunteered to take part. The University noted that the complainant himself declared that he was a participant in one of the focus groups and may well be motivated to track down colleagues who made specific comments.
25. The University stated that many of the quotes are very specific and therefore disclosure would reveal personal data about these individuals, specifically that they participated in a specific EDI focus group during 2019 and expressed a particular view which has been recorded in the report word-for-word. The University explained that the individuals' comments and opinions tell it something about them, such as how they feel or have been treated, as does their participation in a specific focus group, such as their sexual orientation.
26. The University stated that it does not agree with the complainant's claim that "a comment as vague as *"I was overlooked for a promotion because I was black"*...is not sufficient to identify any QMUL employee". The University agreed that whilst, on its own, this may seem like a "vague" comment, when coupled with the fact that it would have been made by one of a handful of participants in the BAME staff focus group who would have applied for a promotion, the possibility of linking this to an identifiable individual increases. The University stated that this example is just a theoretical one suggested by the complainant, whereas many of the real comments are not so general. It stated that there are also some references to other individuals, such as a participant's line manager.
27. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
28. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a "motivated intruder" would be

² <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

able to recognise an individual if he or she was intent on doing so. The "motivated intruder" is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

29. The Commissioner also recognises that some types of data will be more attractive to a motivated intruder than others – and more consequential for individuals. She is mindful of the nature of the requested information in this case, namely information relating to individuals who have participated in specific EDI focus groups.
30. In the circumstances of this case, having considered the information being withheld under section 40(2) of the FOIA, the Commissioner is satisfied that the information relates to the participants of the specific EDI focus groups at the time of the request. She is satisfied that this information both relates to and identifies the individuals concerned, despite the fact that their names are not attached to the comments. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
31. The Commissioner has reached this conclusion on the basis that the focus of the information is individuals that have participated in specific EDI focus groups.
32. In the circumstances of this case, the Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information, which is likely to be in, or come into, the possession of others.
33. Although restricted in what she is able to say in that regard, the Commissioner is satisfied that the University provided her with further explanation in support of its position that releasing the information could assist in identifying individuals in the specific EDI focus groups.

Would disclosure of the information contravene any of the DP principles?

34. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
35. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the UK GDPR, which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

36. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if doing so would be lawful, fair and transparent.
37. In order to be lawful, one of the lawful bases for processing listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful (i.e. not in contravention of any other laws).
38. In addition, if the requested data is "special category" personal data, the public authority must be able to satisfy one of the conditions listed in Article 9 of the UK GDPR in order for disclosure to be lawful and compliant with principle (a).

Is the information special category data?

39. Information relating to "special categories" of personal data is given special status in the UK GDPR.
40. Under Article 9 of the UK GDPR, "special category" personal data is data which:
 - a. reveals racial or ethnic origin,
 - b. reveals political opinions,
 - c. reveals religious or philosophical beliefs,
 - d. reveals trade union membership,
 - e. genetic data,
 - f. biometric data for the purpose of uniquely identifying a natural person,
 - g. data concerning health, or
 - h. data concerning a natural person's sex life or sexual orientation.
41. The University has explained that the withheld information comes from focus groups made up of individuals who were Black, Asian and minority ethnic (BAME) staff, disabled staff, female staff and lesbian, gay, bisexual and transgender (LGBT+) staff. It went onto explain that the information concerns the participation and opinions of individuals who joined focus groups where that participation was dependent on each person's ethnicity, sexuality, health or gender. Most of the comments

directly address each individual commenter's own condition or circumstances.

42. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the majority of the withheld information does consist of special category personal data. She has reached this conclusion on the basis that the comments and opinions made by the participants of the focus groups for BAME, disabled, and LGBT+ staff fall into one of the categories listed in paragraph 40.
43. The Commissioner considers that personal data relating to an individual's gender does not necessarily reveal any special category data. However, this information would likely be particularly sensitive in nature in this case and should be treated with an appropriate level of sensitivity.
44. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it cannot be processed (including disclosure under the FOIA) unless one of the stringent conditions listed in Article 9 can be met.
45. The Commissioner considers that the only conditions in Article 9 that could allow the disclosure of special category personal data under the FOIA are:
 - a. the data subject has given explicit consent to the disclosure; or
 - e) the personal data in question has been manifestly made public by the data subject.
46. The Commissioner has seen no evidence or indication that the individuals concerned have explicitly consented to this data being disclosed to the world at large in response to the FOIA request, nor has she seen evidence to suggest that they had deliberately made this data public at the time of the request.
47. As none of the conditions required for processing special category data are satisfied, disclosing special category data relating to focus groups of BAME, disabled, and LGBT+ staff would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Lawful processing: Article 6(1)(f) of the UK GDPR

48. Having dealt with those elements of the withheld information which constitute special category data, there remains information relating to the female staff focus group which does not fall within special category data but is nevertheless personal data.

49. "Lawful" processing is defined by Article 6(1) of the UK GDPR, which states that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in Article 6 applies. In other words, for processing to be lawful, it must satisfy one of the lawful bases for processing listed in Article 6(1).

50. The Commissioner considers that the lawful basis most applicable to disclosure under the FOIA is that provided by Article 6(1)(f), which states that processing will be lawful if:

*"(the) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*³.

51. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information.
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question.
- iii) **Balancing test:** Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subject.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

52. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

53. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be considered "legitimate interests". They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests can include broad general principles of accountability and transparency for its own sake, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Both compelling and trivial interests can be legitimate interests, but trivial interests may be more easily overridden in the balancing test.
54. Although the complainant has not provided any legitimate interest arguments in his submission to the Commissioner, she notes that he has a personal interest in the report as he stated in his internal review request that he "*was anticipating and looking forward to reading about others' experiences of inclusion at QMUL in the report.*"
55. The Commissioner also accepts that there is a legitimate interest with regards to transparency and accountability in relation to EDI.

Necessary test

56. Where a legitimate interest is being pursued in a request for information that includes third party personal data, it must then be considered whether the disclosure of that information is "necessary" for the purposes of that legitimate interest.
57. "Necessary" means more than desirable but less than indispensable or an absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
58. The Commissioner has considered whether disclosure of the requested information is necessary to meet the requester's specific legitimate interests and the wider legitimate interest in openness and transparency by public authorities.

59. It is important to make clear at this point that disclosure under the FOIA is disclosure into the public domain, not just specifically to the requester. The Commissioner has therefore considered whether disclosure of the third-party individuals' personal data to the world at large is necessary to meet the legitimate interests identified above.
60. The Commissioner considers that the disclosure of the withheld information is necessary to meet the legitimate interests identified above.

Balance between legitimate interests in disclosure and the data subjects' interests or fundamental rights and freedoms

61. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
62. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the data subject expressed concern about the disclosure; and
 - the reasonable expectations of the data subject.
63. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
64. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
65. The University stated that the withheld information concerns each individual's experiences at work but in a way that reveals information about their private life, for example concerning their disability.

66. The University confirmed that all the participants were told "*All information that is shared will be treated confidentially and full anonymity is ensured.*" As such, the University believes the individuals concerned would have no expectation that this information, divulged to a third party, would be released to the world at large.
67. The University stated that the individuals concerned have not been asked whether they are willing to consent to the disclosure of their personal data.
68. The University has stated that if the information were disclosed, it would reveal information about individuals who expected their information to be kept confidential and, in at least some cases, could be detrimental to the individuals concerned if released. The University argues that it is fair to assume that at least some of these individuals would only have made comments in the expectation that people outside their group would not know or discover that they had made such comments. The University argue that to be identified as the individual who made a specific comment that may only have been made in an environment where participants were encouraged to be honest and speak their minds, and believed to be in confidence, would cause distress. Such damage and distress would be unnecessary and unjustified.
69. The University accepts that the right of access under the FOIA is always important, but it does not believe that the FOIA's principles of transparency and accountability are relevant in this case to the extent that these should override data subjects' rights. It stated that because the information consists of special category personal data of members of its staff, it does not believe this disclosure would be fair because identification would be likely to lead to distress of the individuals concerned and go against what they were informed.
70. The University argued that the public have enough information in the report as already released. It stated that the individuals were advised that they would remain anonymous and to undo this would clearly infringe their rights and freedoms and would not be transparent. The University are of the view that it is likely that many of the individuals would not have said what has been recorded in the redacted sections of the report if they had known that their comments would be made public, and colleagues and others could possibly identify them and their views.
71. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

72. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

73. The Commissioner has therefore decided that the University was entitled to withhold the requested information that constitutes personal data under section 40(2), by way of section 40(3A)(a).

Procedural matters

Section 10 – time for compliance

74. Section 10(1) of the FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt of a request for information.
75. In this case, the total time taken by the University to respond to the request for information exceeded 20 working days. The Commissioner therefore considers the University to have breached section 10(1) of the FOIA in this case.

Right of appeal

76. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

77. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
78. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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